U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: 5-24-01

Case No.: **1997-INA-00472**
CO No.: **P95-CA-34235/CAJ**

In the Matter of:

Buonora Child Development Center
Employer,

on behalf of:

Lila Nazari
Alien.

Appearance: Eliezer Kapuya
for Employer and Alien

Certifying Officer: Paul R. Nelson
San Francisco, California

Before: Vittone, Burke, and Chapman
Administrative Law Judges

LINDA CHAPMAN
Administrative Law Judge

Decision and Order

This case arose from an application for labor certification on behalf of Alien Lila Nazari ("Alien") filed by Buonora Child Development Center ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer and

the Alien requested review pursuant to 20 C.F.R. § 656.26.

Statement of the Case

On October 18, 1994, the Employer Buonora Child Development Center filed an Application for Alien Employment Certification, seeking to employ the Alien Lila Nazari, in the position of "Teacher/Preschool." The duties for this position were:

> Will instruct children in activities designed to promote social, physical and intellectual growth in preparation for primary school in pre school day care center or other child development facility.

Two years of experience in the offered job were required. No related occupation experience or education/training were required (AF 21-22).

Following advertisement of the position, the Employer submitted a letter dated May 24, 1995, in which it summarized its recruitment activities. Specifically, the Employer noted that Shannon Kelly Havert and Debora Doryon never responded to the certified mail letters sent to them to arrange an interview. David Santana arranged an interview, but then called back and cancelled. Melinda Aguirre interviewed for the position. She asked about the salary, but when she was told that it was $8.92 per hour, she stated that she was not interested in the job (AF 28).

On November 2, 1995, Certifying Officer (CO) Paul R. Nelson issued a Notice of Findings, in which he notified the Employer of the Department's intent to deny the application for certification. As grounds for the denial, the CO found that one of the applicants, Melinda Aguirre, was not rejected for lawful, job-related reasons. The CO noted that the Employer's reason for rejecting Aguirre was that Aguirre told the Employer in the interview that she was not interested in the job, based on the salary of $8.92 per hour. The CO stated that there was no documentation that the Employer actually offered the job to Ms. Aguirre, or that Ms. Aguirre did not accept the job. The CO concluded that by not offering Ms. Aguirre the job, the Employer failed to engage in good faith recruitment. In order to rebut these findings, the CO instructed the Employer to do three things. First, the Employer should specifically document its lawful, job-related reasons for rejecting Ms. Aguirre at the time of referral and consideration. Second, the Employer should specifically document how the job opportunity was clearly open to Ms. Aguirre at the time of referral and consideration. Third, the employer should specifically document that it engaged in good faith recruitment of Ms. Aguirre at the time of referral and consideration (AF 16-19).

By letter of November 11, 1995, the Employer submitted a letter of rebuttal, in which it stated that:

> The employer has reviewed the interview notes pertaining to MELINDA V. AGUIRRE.

> During her interview, Ms. Aguirre stated that a wage of $8.92 was too low, that she already had a job in child-care that was closer to her home, and that it wouldn't be reasonable to commute to the Buonora Child Development Center. She said she was working full-time in her new job, and did not wish to work for the employer.

The Employer asserted that it interviewed Ms. Aguirre in good faith, and that "Ms. Aguirre rejected the position because the location of the job would have made commuting burdensome" (AF 14).

On January 31, 1996, the CO issued a Final Determination, in which he denied certification. The CO incorporated the Notice of Findings into his explanation. He noted that no documentation was provided to show that the Employer offered the position to Ms. Aguirre or that Ms. Aguirre did not accept the position after being offered it. The CO noted that on rebuttal, the Employer offered new reasons for its rejection of Ms. Aguirre. The CO stated that he was not required to consider reasons for rejection which are first raised after issuance of the Notice of Findings, and therefore, the Employer's "arguments lack either effectiveness or persuasiveness." With regard to the Employer's statement that Ms. Aguirre felt the wage was too low, the CO noted that the Employer had a burden to offer the position to her, and to give her an opportunity to respond to such an offer. The CO found that the Employer had failed to convincingly document that it met its required burden in this matter. The CO concluded that the Employer was in violation of 20 C.F.R. §§ 656.21(b)(6), 656.21(j)(1), and 656.20(c)(8); and that the Employer's rebuttal failed to meet the requirements set forth in the Notice of Findings (AF 6-9).

The case was referred to the Board of Alien Labor Certification, and was docketed on July 22, 1997.

Discussion

The issue in this case is whether the Employer rejected Ms. Aguirre, a qualified U.S. worker, for lawful, job-related reasons. We agree with the CO that the Employer rejected Ms. Aguirre for non lawful job-related reasons. The Employer claimed that Ms. Aguirre asked about the salary during the interview, and then indicated that she was not interested because it was too low. Yet the salary was clearly set out in the advertisement to which Ms. Aguirre responded. The fact that she applied for the position and participated in an interview is evidence that she was willing to consider working for the stated salary. The Employer's proffer of several additional reasons that Ms. Aguirre allegedly gave for her disinterest in the position, for the first time on rebuttal, is not credible. But again, the fact that Ms. Aguirre applied for the position, and participated in an interview, is an indication that she was in fact interested in the position, despite the fact that she already had a job, or would have to commute. Nor has the Employer offered any documentation to support its claims, including the notes of the interview referred to by the Employer, or any corroborating detail, such as the date, location, manner, or length of the interview, or the identity of the person who conducted it. *See, e.g., Komfort Industries, Inc.*, 1988-INA-00402 (May 4, 1989)(*en banc*)(employer submitted notes from telephone call, copy of

letter sent to applicant confirming that applicant not interested in position).

Furthermore, even if Ms. Aguirre had indicated that she wanted a higher salary, her rejection was still unlawful because the Employer did not actually offer the position to her. The Board has consistently held that where an applicant expresses a desire for a higher salary, an employer must actually offer the applicant the position at the salary listed and allow the applicant the opportunity to reject the offer. *Impell Corp.*, 1988-INA-298 (May 31, 1989)(*en banc*); *Johnny Rockets*, 1990-INA-311 (Dec. 8, 1991); *Kaprielian Enter.*, 1993-INA-193 (June 13, 1994). The Employer failed to establish that Ms. Aguirre was actually offered the job, and thus the U.S. applicant was not provided the opportunity to accept or reject the job. *United Cerebral Palsy of the Island Empire, Inc.*, 1990-INA-527 (Aug. 19, 1992).

As the Employer has failed to show that its rejection of a qualified U.S. applicant was for lawful, job-related reasons, certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Linda S. Chapman
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.